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Country of Origin Labeling (COOL) Rule on Fresh Produce Mandatory on September 30, 2008

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On September 30, 2008, Country of Origin Labeling (COOL) will become mandatory on all perishable agricultural commodities that include fresh and frozen fruits and vegetables, as well as chicken, goat meat, ginseng, pecans, and macadamia nuts. Fish, shellfish, beef, lamb, and pork, whether fresh or frozen, farm-raised or wild, are already under COOL regulation. COOL mandates that retailers identify for consumers the source of the food they purchase. Consumers have long considered labeling as important information for which they are willing to pay extra. COOL works in concert with government inspections, enabling consumers to make informed decisions and offering American producers fair market competition. COOL benefits U.S. consumers, retailers, and farmers.

Background

On May 13, 2002, the Farm Security and Rural Investment Act of 2002 (more commonly known as the 2002 Farm Bill) became the underlying law mandating country of origin labeling (COOL). The basic tenet of the law requires retailers to notify their customers of the origin of covered commodities. The foods affected were beef, lamb, pork, fish, perishable agricultural commodities, and peanuts.

On January 27, 2004, Public Law 108-199 (2004 Consolidated Appropriation Act) delayed implementation of mandatory COOL for all covered commodities except wild and farm-raised, fresh and frozen fish and shellfish until September 30, 2006. The interim final rule for fish and shellfish was published by USDA on October 5,

2004 (7 CFR 60) and became effective on April 5, 2005. Public Law 109-97 (FY2006 Agriculture Appropriation Law) delayed the implementation of mandatory COOL for all covered commodities except wild and farm-raised, fresh and frozen fish and shellfish for a second time to September 30, 2008.

The Food, Conservation and Energy Act of 2008 (Public Law 110-246 or 2008 Farm Bill) that was recently enacted on June 18, 2008, expanded the list of covered commodities to include chicken, goat meat, ginseng, pecans, and macadamia nuts. Perishable agricultural commodities are defined to include fresh and frozen fruits and vegetables. The interim final rule for all remaining covered commodities was published on August 1, 2008 (7 CFR 65) and will become effective on September 30, 2008. Covered commodities produced or packaged before September 30, 2008 are not affected.

The key changes to the COOL law are

- USDA is barred from requiring new recordkeeping procedures other than normal records kept in the regular course of doing business.
- State, commodity-specific, and regional or locality labeling meets COOL standards for all covered commodities except meats, fish, and shellfish. Examples of descriptors that comply with COOL:
 - Hawaii Grown
 - Baja onions
 - Pennsylvania Dutch mushroom
 - Jersey fresh.
- Retail liability at point of purchase is based on the "good faith" standard.

- Retailers and suppliers have a 30-day compliance window, and fines are limited to \$1,000 per violation.
- Retailers are not liable for misinformation provided by suppliers.

Who must label

Retailers of the covered commodities must comply with COOL. Under the Perishable Agricultural Commodities Act of 1930 (PACA, 7 U.S.C. 499 et seq.), a retailer is any person engaged in the business of selling any perishable agricultural commodity at retail. Retailers are required to be licensed when their annual invoice exceeds \$230,000. The COOL law applies only to licensed retailers. There are currently 4000 active retail licensees (36,000 stores). Under PACA, WalMart and Costco are retailers.

The 2008 Farm Bill exempts all foodservice establishments, including those within retail establishments such as restaurants, cafeterias, bars, lunchrooms, food stands, salad bars, delicatessens, and other food enterprises that provide ready-to-eat foods. Watermelon chunks sold in a restaurant are not covered by COOL, but watermelon chunks sold in the produce department need to comply with COOL.

What need not be labeled

Excluded from the COOL law are covered commodities that are ingredients in a processed food item. Cutting, chopping, and peeling are not considered processing steps because no character changes occur. Processing is defined as the covered commodity having undergone physical or chemical change resulting in any of the following:

- A change in the character of the covered commodity, such as cooking (includes frying, boiling, grilling, broiling, steaming, baking, roasting), curing (includes salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (emulsifying or extruding). Examples are fruit yogurt, fruit smoothies, dried apricots, brined or pickled peppers, fresh squeezed juice, pasteurized juice, canned peaches.
- Being combined with at least one other covered commodity. Examples are fresh cut mixes of blueberries, strawberries, and melons; sliced apples and peeled grapes; apples and oranges in one bag; watermelon and melon chunks; fruit in a compartmented tray; frozen peas and carrots; salad mixes of lettuce, carrots, cabbage, and/or salad dressing; fresh green beans and wax beans.
- Being combined with another substantive food component. Examples are breaded zucchini slices, choco-

late-covered macadamia nuts, fresh strawberries in chocolate, breaded okra, artichokes with cheese.

- Products sold in farmers' markets, unless sold to retailers.

What must be labeled

The following are not considered processed items and must comply with the COOL law unless sold in a food-service establishment:

- diced rainbow pepper (only one commodity and all grown in the USA). If not all grown in the USA, it is permissible to label, for example, as "USA/Mexico/Canada" but not "USA and/or Mexico" or "may contain..."; origin has to be definite; in general, commingled covered commodities should be labeled in accordance with existing Customs and Border Protection marking regulations (19 CFR 134).
- fresh cut cantaloupe
- honeydew and cantaloupe mix (all melons)
- package of enoki, shitaki, button mushrooms (all mushrooms)
- watermelon chunks
- fresh strawberries with sugar (4:1 ratio)
- apples in a bag (20 different varieties)
- apples that are sliced, chopped, or diced
- diced mushrooms.
- muscle cuts beef, lamb, chicken, goat, and pork
- ground beef, ground lamb, ground chicken, ground goat, and ground pork
- fish and shellfish (wild and farm-raised)
- perishable agricultural commodities (fresh and frozen fruits and vegetables)
- peanuts, pecans, and macadamia nuts
- ginseng.

Determining origin

U.S. origin may be used on the label if:

- fresh and frozen fruits and vegetables, pecans, peanuts, macadamia nuts, and ginseng are grown in the United States, including all its possessions and territories.
- covered commodities that meet "U.S. origin" are then sent to a foreign country for further handling, as long as identity of the product is maintained, along with necessary records. Example: carrots sent to Mexico for peeling and cutting.

Imported covered commodities for which origin has already been established and for which no production

steps occur in the USA retain their origin as declared to U.S. Customs and Border Protection. Example: Chilean grapes.

Notification and markings

Any person engaged in the business of supplying a covered commodity to a retailer, directly or indirectly, must make information available to the buyer about the country or countries of origin of the covered commodity. Such information may be provided on the product, master shipping container, or in a document that accompanies the product through retail sale, such as the covered commodity package, invoice, or bill of lading. For example, if the master container contains cucumbers, of which 50% are from Mexico and 50% are from the USA, it must accurately state so.

Bulk containers may contain covered commodities from multiple origins and must be labeled accordingly. The label on bulk or master container must be the same as the label on the consumer package. Bags inside the labeled bulk container need not be individually labeled but the retailer may require this. On the other hand, if individual containers are labeled, the bulk or master container or the invoice need not be labeled. Labeling of a hand of bananas and not the individual fingers is sufficient.

For remotely purchased products, such as internet sales or home delivered products, the retailer may provide the country of origin on the sales vehicle or at the time the product is delivered.

Markings must be legible and placed in a conspicuous location. Retail markings are not necessary on individual commodities but may be placed on a placard, label, band, pin tag, sign, sticker, twist tie, or other display.

Acceptable abbreviations may be used, but symbols or flags alone are not acceptable markings. Examples of acceptable declarations for country of origin are

- Product of the USA
- Produce of the USA
- Grown in Mexico
- U.S.
- Canada
- China.

State, regional, locality designations are acceptable for all covered commodities except meats, fish, and shellfish; examples are

- California grown

- Idaho potatoes
- Northwest cherries
- Tampico onions
- Washington state apples.

Recordkeeping

Records are needed to show the chain of custody. Growers and suppliers need to keep records of where they purchased the covered commodities and to whom they sell them (i.e., one step back and one step forward).

Records must be legible. In addition to hard copy and electronic forms, other forms of records are acceptable. These records may be maintained in any location. Within five business days of a request of USDA representatives, retailers are required to provide records maintained in the normal course of business that verify an origin claim.

Recordkeeping for retailers

If pre-labeled in consumer-ready packages of covered commodities, the label is sufficient evidence of COO if the label was made by the firm making the claim.

If pre-labeled on the shipping container of covered commodities, retailers must either maintain the pre-labeled shipping container at the retail store for as long as the product is on hand, or ensure that COO is included in the record identifying the covered commodity and the retail supplier.

If covered commodities are not pre-labeled, records must identify covered commodity, the retail supplier, and the country of origin.

Recordkeeping for suppliers

Suppliers include and are not limited to growers, distributors, handlers, packers, and processors. Suppliers initiating the claims must possess or have legal access to records necessary to substantiate the claims. Suppliers must maintain records for 1 year from the date of transaction to establish and identify the immediate previous source and the immediate subsequent recipient of the covered commodity.

Compliance and enforcement

Only the USDA can initiate enforcement actions of non-compliance with COOL regulations. Violators are given 30 days to comply through good faith efforts after which civil penalties of up to \$1,000 per violation may be assessed. Any mislabeling of COO is also a violation of PACA misbranding provisions.

The USDA has established official multi-year cooperative agreements with state agencies to assist with COOL Retail Surveillance responsibilities. For example, 540 out of 1657 audited retail stores were found in violation of COOL requirements in 2007 at an average of two violations per audit conducted. During FY 2006, 69 suppliers were audited, with four found to be non-conforming to COOL requirements.

It is the responsibility of all companies to verify for themselves the specific actions they should take. Please consult with your own legal advisors to insure compliance with the law.

References

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